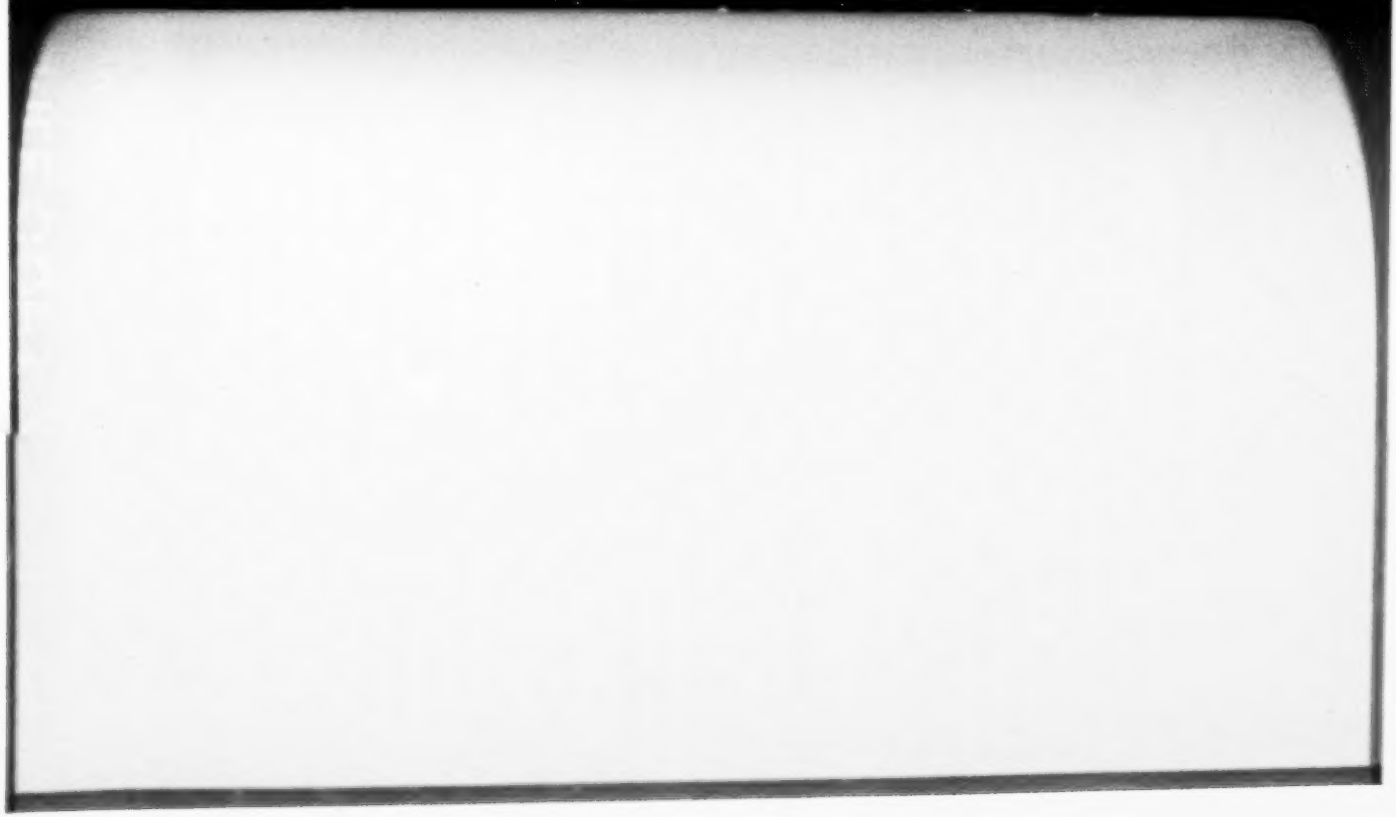

In the Supreme Court of the United States.

OCTOBER TERM, 1924. No. 629.

The Pennsylvania System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Appellant,

vs.

The Pennsylvania Railroad Company, Samuel Rea, W. W. Atterbury, Elisha Lee, George L. Peck, C. S. Krick, M. W. Clement, T. B. Hamilton and I. W. Geer, Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF APPELLEES.

ARGUMENT.

The discussion in the major part of the brief of the appellant and the text of the argument is what should in the judgment of appellant have been the operation and effect of

Title III of the Transportation Act upon disputes between employer carriers and their employes, and the procedure to be adopted upon the interpretation made by the appellant. It is assumed by appellant that a remedy is provided by the Act and that orders or decrees arising therefrom are mandatory upon parties and enforcible by the courts. Upon this erroneous assumption as a foundation is erected the structure of this Bill and the relief prayed for therein, that the course followed by the appellees was in defiance of a legally enforcible right, and that its development, by the appellees, constitutes a conspiracy. These assertions while economically interesting, afford no basis to sustain the prayers of the Bill, because, as shown hereafter and more fully, and as declared in the opinions of the District Court and the Circuit Court of Appeals dismissing the Bill, the courts are without power under the decision of this Court, hereinafter referred to, to enforce orders of the Labor Board. It follows, therefore, that aside from the fallacy and weakness of this position and of its lack of support by the courts, the allegation of conspiracy cannot be sustained because, as more fully shown hereafter, there can be no conspiracy unless there be an intent to accomplish an unlawful act or to do a lawful act by unlawful means by a combination of parties to that end. Thus the right to relief in equity upon the allegations of the Bill must be founded upon the position taken by the appellant that the representatives of the employes of the appellee Company were improperly elected under Title III of the Transportation Act because the organizations of employes were excluded as representatives, and that, therefore, all conferences, agreements, decisions, rules and working conditions made by the appellees with the representatives chosen at the election described in the Bill are void. Upon this question the Circuit Court of Appeals said (Record, page 374):

> "The complainants have expressly grounded their actions on the Transportation Act of 1920 and, limiting their grievance against the respondents to their refusal to observe its terms, they have asserted that

> the conduct of the respondents is in violation of rights granted them by that Act in declaring a national policy in respect to railroad labor disputes. Thus both the pleadings and the facts show that complainants stand on their statutory rights. To these alone we shall address discussion."

It is inferred that a conspiracy exists between the appellees on the one side and the representatives chosen at the election. No citation of authority is given supporting the averment of conspiracy. The analogy between the interference upon such ground by the courts with acts tending to interfere with the flow of interstate commerce has no application (Appellant's Brief, page 72). The public is not concerned with this controversy except so far as the interference with existing conditions might create a strike and thus interfere with the flow of commerce. This event would be speculative and remote, and in any case is not involved in this proceeding, and even should it be involved, it would seem clear that the Clayton Act, Section 20, prohibits injunctive relief in a case of this character. (Michaelson *vs.* U. S., 45 Sup. Ct. Rep. 18.)

The District Court dealt in its opinion (294 Fed. 556), with this question thus (Record, page 360):—

> "The plain truth of the whole matter would seem to be that the only legal right which the plaintiff has is a right to an expression of the opinion of the Labor Board that under all the circumstances and considerations affecting the subject matter they ought to have more than the strictly legal rights which belong to them, although even this does not belong to these plaintiffs *eo nomine* but to the employes of the defendant company. This right has already been given them by the award of the Labor Board, and no Court can grant them more than their legal rights."

The Circuit Court of Appeals said (Record, page 375):

> "Further asserting statutory rights in themselves, the complainants maintain that the conduct of the Com-

pany and its officers was a statutory offense in the nature of conspiracy under the provisions of Section 19 of the Criminal Code which provides that, 'If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the * * * laws of the United States,' they shall be punished, and they further maintain that injunction will lie to restrain means for promoting such conspiracy. *Pettibone* vs. *United States*, 148 U. S. 197; *Duplex Co.* vs. *Deering*, 254 U. S. 465. Even so, the thing which is done or is threatened must in itself be unlawful, or, if lawful, it must be carried out by unlawful means in order to constitute a conspiracy. The thing here charged against the Company was conduct which, under the terms of the Transportation Act and in the light of the decision of the Supreme Court in *Pennsylvania Railroad Company* vs. *Labor Board, supra,* was not unlawful either in purpose or in means employed to carry out the purpose. It follows that in their conspiracy charge the complainants are not aided by a statutory right."

The question with respect to the legality of the selection of representatives has been the subject of consideration by the District Court for the Eastern District of Pennsylvania in the case of *Fenstemacher* vs. *Pennsylvania Railroad Co.*, 296 Fed. 213, wherein there was an application for an injunction based upon substantially the same averments as in the case at bar, save the allegation of conspiracy. Therein the Court stated that the position of the defendant was that it was under no obligation to confer other than with the representatives of its own employes and the position of the plaintiff was that the conference commanded by law was one between the carrier and the labor organization to which those of the employes who were organized belonged, together with the representatives of those employes who had no such organization. The District Court, after citing the

opinion of the Circuit Court of Appeals for the Seventh Circuit in *Pennsylvania Railroad Co.* vs. *Labor Board,* 282 Fed. 701, dealt with the question of the authority of the Court, stating (p. 216):—

> "All must agree that a controversy which can be settled only by an agreement wholly voluntary or reached upon compulsion is a controversy with which the courts without statutory command have nothing to do."

The same Court also dealt with these questions in the case of *Brotherhood of Railway &c. Employes* vs. *Pennsylvania Railroad Co.,* 296 Fed. 218, upon an application for an injunction, wherein the Court declined to issue an injunction, and the Circuit Court of Appeals in its opinion said:—

> "We find nothing in the statute which makes it compulsory upon the employer to confer with the representatives of the employes or further to contest the matter before the Labor Board." (Record, page 375.)

After the cases in the District Court were decided this Court heard and decided on February 19, 1923, the case of *Pennsylvania Railroal Company* vs. *U. S. Labor Board,* 261 U. S. 72, involving the construction of Title III of the Transportation Act.

The Circuit Court of Appeals in its opinion in this case recites the history of that case (Record, page 372).

The application of the complainant in that case was that the Labor Board be restrained from publishing under section 313 of Title III of the Transportation Act that the Railroad Company had violated the Board's decision under that Act, known as decision No. 218. This Court held that publication of the decision of the Labor Board is authorized by the said section and that this power constitutes the only

method by which the decisions can be enforced (page 79). This Court then discussed fully the question of the proper representatives of the employes, saying (page 84):—

> "The counsel for the Company insist that the right to deal with individual representatives of its employes as to rules and working conditions is an inherent right which cannot be constitutionally taken from it. The employes, or at least those who are members of the labor unions, contend that they have a lawful right to select their own representatives, and it is not within the right of the Company to restrict them in their selection to employes of the Company or to forbid selection of officers of their labor unions qualified to deal with and protect their interests. This statute certainly does not deprive either side of the rights claimed."

The Court then discussed the provisions under Title III for action by the Board and continues (page 84):—

> "The jurisdiction of the Board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the Act there is no constraint upon them to do what the Board decides they should do except the moral constraint, already mentioned, of publication of its decision. * * * The statute does not require the Railroad Company to recognize or to deal with, or confer with labor unions. It does not require employes to deal with their employers through their fellow employes. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen with a view to securing a satisfactory cooperation and leaves it to the two sides to accept or reject the decision."

This principle has been re-affirmed by this Court in the recent case of *Michaelson* vs. *United States*, 45 Sup. Ct. Rep. 18 (October 20, 1924), wherein it is said, page 21:—

> "The Labor Board was not an employer, but arbitrator, whose determination, moreover, had only the force of moral suasion."

So far, therefore, as the appellant rests its Bill upon the allegation that the Company and its officers could not deal with the representatives of the employes chosen in the manner set out in the Bill, it is established that there is no basis upon which such allegation can be sustained, this Court having definitely decided to the contrary.

There can be no conspiracy except with the intent and purpose or with the effect of accomplishing an unlawful act by a combination of persons to that end, (Pettibone *vs.* U. S., 148 U. S. 197; Duplex Co. *vs.* Deering, 254 U. S. 465), and as said on page 66 of Appellant's Brief, conspiracy may be defined as: "A combination of two or more persons by concerted action to accomplish an unlawful purpose, or a purpose not in itself unlawful by unlawful means." There is here no unlawful act and no intent to commit one by any means lawful or unlawful. The transaction described must necessarily be conducted by representatives of the employes and the officers of the carriers through whom only can it act as a corporation. Therefore it is a necessary incident to any action under the Transportation Act that a number of persons shall be involved in its occurrence. As well might the complainant have been charged with conspiracy in its united action to establish the rights it claims or to assert them in this proceeding.

Upon this question the Circuit Court of Appeals said (Transcript of Record, page 373).

> "The theory of these cases is both negative and affirmative. It is negative in the sense that the complainants do not expressly ask the Court to enforce any of the decisions which the Labor Board made in this dispute. Obviously, this is for the reason that the Supreme Court, in Pennsylvania Railroad Co. *vs.*

United States Railroad Labor Board, 261 U. S. 72, 43 Sup. Ct. 278, 67 L. Ed. 536, decided that orders of the board are not enforcible by the courts. Going a step further, they say their position is entirely independent of decisions Nos. 119 and 218 of the Labor Board prescribing rules and form of ballot for choice of representatives by the employes, and of Decision No. 1829 declaring that the Company had violated its decision, although the practical effect of a decree granting the prayers of their bills would be the enforcement of these orders. The theory is affirmative in the sense that the complainants stand upon what they describe as their 'civil and statutory rights,' and, averring a conspiracy to deprive them of these rights, they invoke the injunctive remedy of a court of equity, in the absence of an adequate remedy at law, to restrain the respondents from continuing and completing such conspiracy to their injury."

Appellant also rests its application for equitable relief upon the ground that appellees have violated Sections 19 and 37 of the Criminal Code, set out at pages 66 and 69 of its brief. Section 19 of the Criminal Code (7 Fed. Stat. Ann. 2nd Ed. 484) is as follows:—

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

If appellant's theory that appellees have violated this section of the Criminal Code is sound, then appellees would be subject to indictment and cannot be charged with conspiracy.

In *U. S.* vs. *N. Y. C. & H. R. R. Co.*, 146 Fed. 298, the several defendants were indicted charged, among other things, with a conspiracy to give rebates contrary to the provisions of the Interstate Commerce Act, whereby upon conviction the parties were subject to fine. The Court held that when an offense requires concert of action by at least two parties, an indictment will not lie charging such parties with conspiracy to commit the same offense, saying (p. 303):—

> "When the concurrent action of two persons is necessary to perpetrate a certain crime, and all that they do is to agree to do it and to do it, it seems difficult to claim that their agreement to act is in law a conspiracy, and their act a distinct crime, and that the agreement to act can be punished more severely or differently from the act itself. I think that the offense of giving or receiving rebates is such an act. It requires the concurrence of two persons. A rebate cannot be given unless there is someone who agrees to receive it and who does receive it, and cannot be received unless there is someone who agrees to give it and who does give it. The claim that the agreement to give it is a conspiracy punishable by imprisonment, while the actual giving of it is an offense only punishable by a fine, seems to me too subtle a distinction to be drawn in the administration of criminal law."

This principle was approved in the following cases:—

U. S. *vs.* Shevlin, 212 Fed. 343;
U. S. *vs.* Burke, 221 Fed. 1014;
McKnight *vs.* U. S., 252 Fed. 689;
Vannata *vs.* U. S., 289 Fed. 424, 427.

Moreover Section 19 of the Penal Code is limited in its application to political rights. (*U. S.* vs. Wheeler, 254 Fed. 611; 254 U. S. 281.)

The Circuit Court of Appeals disposed of this matter in that portion of its opinion quoted above. (Record, pp. 375-376.)

Section 20 of the Clayton Act provides in its concluding clause "nor shall any of the acts specified in this paragraph be considered or held to be violations of *any law of the United States.*" That paragraph, among other things, specifies any act or thing which might lawfully be done in the absence of a dispute between employer and employes, by any party thereto. If no dispute between appellant and appellees existed, the lawfulness of the acts and things which appellant alleges in its Bill were done by appellees could not be questioned. These acts are among those specified in the concluding paragraph of Section 20 of the Clayton Act and by its express terms cannot be violative of any law of the United States.

Section 37 of the Criminal Code which it is alleged appellees have violated, is as follows:—

> "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose and one or more of such parties do any act to effect the object of such conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars or imprisoned not more than two years or both."

It is only necessary to consider this in connection with the opinion of this Court in Pennsylvania Railroad Company *vs.* Labor Board, supra, construing Title III of the Transportation Act to demonstrate that the appellees cannot be said to have committed any offense against the United States. This Court expressly decided in that case that Title III

of the Transportation Act does not require the Railway Company to recognize or to deal with, or confer with labor unions. If the appellees, therefore, have done nothing which is forbidden by the Statute, it cannot possibly be said that they have conspired either to commit an offense against the United States or to defraud the United States.

Appellant is asking the courts to do what the Circuit Court of Appeals for the Eighth Circuit in the case of *Daniels*, et al. vs. *Portland Mining Company*, 202 Fed. 637, refused to do, namely, invade the field of the legislative branch of the government. In that case the suit was brought by three mining corporations on behalf of themselves and many others to enjoin defendants from conducting business as assayers or purchasing stolen ore. The District Court granted a preliminary injunction and the Circuit Court of Appeals reversed the order, saying (p. 639):—

> "We think the injunction was an inadmissible exercise of the judicial power. Consistently with the fullest recognition of the progressive and flexible character of equity jurisprudence and its continuing adaptability to the increasing magnitude and complexity of modern affairs, care must nevertheless be taken not to transgress its fundamental limitations. Though the writ of injunction may be properly employed to protect rights of property, however great or small, complicated or simple, it should not be made a vehicle for invading the legitimate legislative province of government or a means of establishing a system of rules for the regulation of the business of a community. Nor should it be used as an ordinary supplement to the criminal laws of the state."

The Supreme Court in that case refused a petition for a writ of Certiorari (229 U. S. 611).

The District Court in dismissing the Bill in this case said: "Our difficulty is in recognizing the presence of the element

either of lawfulness or unlawfulness * * * in what the defendant did or refused to do or in its every act or in any part of its conduct," (Record, page 361). It is clear, therefore, that the provisions of the Criminal Code relied upon by the appellant will not sustain the prayers of this Bill, and complainant must be and is relegated to the allegations with respect to the alleged wrongs suffered by it in the administration of Title III of the Transportation Act, and it is definitely shown by the preceding portions of this brief that there has been no breach by the appellees of the provisions of that Act and therefore, there was no unlawful act committed or any unlawful means adopted to commit an act.

It follows, therefore, that in substance this action is an attempt to enforce a decision of the Labor Board and it is shown by the decision of this Court in *Pennsylvania Railroad Company* vs. *Labor Board, supra*, that the Courts cannot enforce a decision of the Board.

The District Court correctly defined the rights of the parties and the powers of courts and the Labor Board in the following portion of its opinion (Record, p. 356):—

> "A Court, although it can award to a litigant only that to which he has a legal right, has the power to see to it (within practicable limits), that he gets what is awarded him. The Labor Board has no such power. The judgment it may render may be acceptable to neither party but each has the legal right to accept it or refuse to follow it. If the parties refuse acquiescence all that the Board can then do is to give publicity to its ruling, leaving the parties to their willingness to adjust the disputes under the guidance and perhaps the stress of public opinion, influenced, or it may be aroused, by the opinion of the Board."

As the acts which the appellees are alleged to have committed are within their legal rights to pursue, they cannot upon any ground be asserted to be an obstruction of the

utilization of Title III by the clerical and station employes. As pointed out by this Court and also by the District and Circuit Courts the courts have no power under the Act to enforce decisions of the Labor Board. The Court rightly ruled that what appellant is asking in this case, substantially, is the enforcement of a ruling of the Labor Board and it, therefore, was correct in dismissing the bill. It is submitted upon all the grounds relied upon that the order appealed from should be affirmed.

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